10264.2 Particularity of Complaint

The allegations of the complaint should be sufficiently detailed to enable the parties to understand the offenses charged and the issues to be met. The complaint should be sufficiently specific to defend against a Motion for a Bill of Particulars. Sec. 10292.1. For example:

- An 8(a)(1) or 8(b)(1)(A) allegation should specify the names of offending supervisors or union agents, with the dates and locations of each incident.

- The location of each incident should be described as specifically as possible, consistent with the need to protect the identity of the witnesses.

- The names of the alleged discriminatees and dates of the underlying acts should be set forth.

- The complaint allegations should set forth a general legal description of the type of alleged violations rather than attempting to quote, for instance, exact language used in an allegedly unlawful statement.

However, certain matters need not appear in the complaint, either because of the nature of the issue or because the Regional Office lacks specific knowledge. For example:

- Where the names of certain alleged discriminatees are unknown at the time of complaint issuance, they may be described as "others presently unknown to the undersigned." (Of course, whenever the names become known, they should be added by amendment.)

- Names of employees alleged to be the objects of 8(a)(1) or 8(b)(1)(A) conduct who are not entitled to specific individual relief should not appear in the complaint.

- Conduct relied upon as background material to which no unfair labor practice finding will be sought should not be alleged.

Careful drafting of the complaint or amendment, when such becomes necessary in the interest of accuracy or clarification, avoids many problems during trial and time-consuming briefs and arguments. The failure to properly draft or amend complaints can result in the loss of substantive rights. *McKenzie Engineering Co.*, 326 NLRB 473 (1998); *NLRB v. H. P. Townsend Mfg. Co.,* 101 F.3d 292 (2d Cir. 1996), denying enf. 317 NLRB 1169 (1995).

10266 Remedies and Circumstances Pled in Complaint

10266.1 Specific Remedies

When the remedy sought is in addition to that traditionally granted for the violations alleged, the complaint should contain a separate request for specific remedial relief in order to provide respondent adequate notice. See Secs. 10131, 10407.1, and 10410. Such a request should specifically reserve the General Counsel's right to subsequently seek, and the Board's right to ultimately provide, any other appropriate remedy.

10266.2 Strike Situations

In cases involving an unfair labor practice accompanied by a strike allegedly in protest thereof, the Regional Office should determine the nature of the strike. If the evidence supports a finding of an unfair labor practice strike, the Regional Office should allege such status in the complaint and seek an open-ended order requiring the reinstatement, on application, of all qualified striking employees.

Notwithstanding the above, the Regional Director has discretion not to plead and litigate the nature of the strike in a test of certification case where summary judgment is otherwise appropriate. Sec. 10282.1.

10266.3 Unlawful Fees, Dues, or Assessments

In cases where initiation fees, dues, or assessments are alleged to have been unlawfully collected, the complaint should describe the specific contract, arrangement, or practice by which the collections were made. An employer or union allegedly involved in such collection, but not named as a respondent, should be named as a party in interest in the complaint.

10266.4 Electronic Notice Posting

In certain cases, it may be appropriate to seek electronic notice posting in addition to traditional posting where the charged party customarily communicates with its employees or members electronically and/or where a charged party utilized its e-mail or intranet system in committing an unfair labor practice. OM Memo 06-82 and Sec. 10132.4(b).

10280 Answer

Within 14 days from the service of the complaint, respondent must file an answer, signed by respondent's attorney or representative, or by the respondent if unrepresented, specifically admitting, denying, or explaining each of the facts alleged in the complaint, unless respondent states in its answer that it is without knowledge, thereby operating as a denial. Secs. 102.20–102.22, Rules and Regulations. An answer may be filed electronically at the Agency's website under "Regional, Subregional & Resident Offices." See Sec. 11846.4. However, because of the requirement that an answer be signed, an original and four copies of such answer must also sent to the Regional Office so that it is received no later than three (3) business days after the date of the electronic filing. See OM Memo 07-07 (Revised) dated November 15, 2006.

With respect to answers that lack particulars, see Sec. 10292.2.

10280.1 Allegations Not Denied Deemed Admitted

Pursuant to Section 102.20, Rules and Regulations, complaint allegations shall be deemed to be admitted as true if no answer is filed. Likewise, any allegation not specifically denied or explained in an answer, unless respondent avers in its answer that it is without knowledge, shall be deemed to be admitted as true and shall be so found by the Board, absent good cause to the contrary.

10280.2 Motion to Strike Improper or Deficient Answer

Where respondent has filed an improper or deficient answer, the Region should provide respondent sufficient notice and an opportunity to appropriately amend the answer. If respondent fails to remedy the deficiency, counsel for the General Counsel should file a motion to strike the answer, in whole or in part.

(a) *Improper or Deficient Answer:* An answer may be improper or deficient, where:

- The answer is not signed.
- The asserted denials in the answer have no legitimate basis and appear to be made solely for purposes of delay.
- Scandalous or indecent matter is included in the answer.

(b) *Notice to Attorney or Representative:* Upon receipt of an improper or deficient answer, the Regional Office should send a letter to the attorney or representative providing an explanation of the improper or deficient nature of the answer. The letter, should also assert that the answer, or a portion of the answer, appears to have been filed without good grounds to support it and for purposes of delay citing Sec. 102.21, Rules and Regulations. The letter should further inform the attorney or representative[1] that

[1] If the respondent files an answer without the assistance of an attorney or other representative, the Board has generally given such a party more latitude in reviewing the sufficiency of the answer because such a pro se party is generally unfamiliar with the Board's Rules and Regulations and procedures. See, e.g., *S&P Electric*, 340 NLRB 326 (2003); and *A.P.S. Production*, 326 NLRB 1296 (1998). In such circumstances,

unless a proper answer is filed within one week of the letter counsel for the General Counsel intends to file a motion with the Administrative Law Judge to strike the answer, or a portion of the answer, as sham and false and requesting that the Administrative Law Judge "proceed as though the answer had not been served." See generally OM Memo 05-55.

(c) *Filing of a Motion to Strike* If respondent does not adequately justify or appropriately amend its answer within the time allowed and persists in contesting the matter without good grounds, counsel for the General Counsel should prepare and file with the Administrative Law Judge a motion to strike the answer, or portion thereof, as sham and false. Such motion should request that the action proceed as though the answer, or that portion of the answer, had not been served.

Generally, if such motion is denied by the Administrative Law Judge, counsel for the General Counsel should request special permission of the Board to appeal. Sec. 10404. If the hearing has opened and the ALJ insists on a presentation of the evidence forthwith, counsel for the General Counsel should proceed with the case, simultaneously pressing the appeal to the Board.

If the motion is granted, counsel for the General Counsel should proceed as if only the unstricken portion of the answer has been filed.

(d) *Special Remedy:* In some cases, it may also be appropriate to contact the Division of Advice regarding the possibility of seeking as a special remedy in the underlying unfair labor practice proceeding that respondent be ordered to pay a portion of the General Counsel's attorney's fees incurred as a result of the filing of an answer without good grounds to support it.

(e) *Referral of Alleged Misconduct:* Immediately after the conclusion of the hearing, the Regional Office should also consider whether it is appropriate to make a referral of alleged misconduct by the attorney or representative with regard to the improper or deficient answer under Sec. 102.177, Rules and Regulations. See Sec. 10058.6.

10280.3 No Answer Filed; Motion for Default Judgment

If an answer has not been filed within the time allowed, counsel for the General Counsel should communicate in writing with respondent's counsel, or with respondent if it is not represented, advising that no answer has been filed in accord with the Rules and Regulations and that if an answer is not filed within a certain period of time (normally not to exceed 1 week from date of written communication), counsel for the General Counsel will file a Motion for Default Judgment with the Board. If an answer is not filed within the applicable deadline, counsel for the General Counsel should file a Motion for Default Judgment with the Board. See *Malik Roofing Corp.,* 338 NLRB 930 (2003).

If, after the filing of a Motion for Default Judgment, an answer is later filed, the Regional Office may successfully continue to seek default judgment, where the answer was untimely with no explanation. See, e.g., *Kenco Electric & Signs,* 325 NLRB 1118

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the Regional Office should provide the pro se party with an explanation of the Board's Rules and Regulations regarding the sufficiency of the answer.

(1998). However, where respondent is proceeding pro se, the Board may be reluctant to grant a Motion for Default Judgment where respondent answers the complaint and responds to the Board's order to show cause. See, e.g., *A.P.S. Production/A. Pimental Steel,* 326 NLRB 1296 (1998).

10280.4 Answer to Amended Complaint

The above procedures also apply to an answer to an amended complaint. However, with respect to amendments made at the hearing, the nature of the amendment will determine whether the Administrative Law Judge provides 14 days for answer to the amendment. Sec. 10406.2 and Sec. 102.23, Rules and Regulations.

10282 Motion for Summary Judgment in 8(a)(5) Cases

10282.1 Generally

In technical 8(a)(5) cases (i.e., where respondent is testing a Board certification and/or the proceeding on which it is based and there are no factual issues warranting a hearing), a Motion for Summary Judgment should be filed with the Board. Sec. 10025. In general, if there are factual issues involved, a Motion for Summary Judgment is not appropriate. However, where charging party's allegations include both a technical 8(a)(5) violation and other allegations warranting a hearing, the Regional Director may exercise discretion in appropriate cases to move for summary judgment solely on the technical 8(a)(5) allegations. Under such circumstances, the Regional Office should explicitly reserve the right to litigate the other alleged violations. Such allegations suitable for future litigation include:

- Unilateral changes occurring after the bargaining obligation attaches
- Claims that the 8(a)(5) conduct affects the reinstatement rights of striking employees

See Sec. 10026 generally for a discussion of 8(a)(5) charges and Sec. 10026(b) for avoiding future litigation by entering into a stipulation that is contingent on court enforcement of a Board Order.

10282.2 Regional Procedure

A Motion for Summary Judgment should be filed within 7 days after respondent files its answer in a technical 8(a)(5) case (i.e., respondent is testing the Board certification and/or the proceeding on which it is based).

(a) *Respondent's Answer:* On receipt of respondent's answer to the complaint (or expiration of the time to file an answer), the Regional Director should determine whether to file the motion.

(b) *Motion to Board:* Applications for summary judgment (eight copies each of the motion and attachments) in appropriate 8(a)(5) cases should be addressed directly to the Board and transmitted to the Office of the Executive Secretary. Motions may also be

filed electronically at the Agency's website under "Board/Office of the Executive Secretary." See Sec. 11846.4.

Since all summary judgment motions must be filed no later than 28 days before the scheduled hearing date (Sec. 102.24, Rules and Regulations), if the Regional Office intends to file such a motion it should either issue a Notice of Hearing without hearing date with the complaint or provide enough time to permit the filing of a timely motion.

In all technical 8(a)(5) cases, if the Regional Office anticipates it will file a Motion for Summary Judgment, the Complaint and Notice of Hearing should set forth that a hearing, if necessary, will be conducted at a time and date to be determined in the future. All copies of the motion to transfer case to and continue proceedings before the Board and for summary judgment must be accompanied by copies of the following documents, if any, in the formal file:

- Original charge and amended charge
- Affidavit of service of charge and amended charge
- Complaint, amended Complaint and Notice of Hearing
- Affidavit of service of complaint, amended Complaint and Notice of hearing
- Respondent's answer and amended answer to complaint
- Letter from counsel for the General Counsel to respondent advising of the consequence of not filing answer. Sec. 10280.3.

In the event that the summary judgment proceeding is an 8(a)(5) case involving test of certification, the record should also include copies of the following documents, if any, in the formal "R" case file:

- The petition
- The Regional Director's decision, consent election agreement, or stipulated election agreement
- Any Request for Review of the Regional Director's Decision and the Board's Order regarding the Request for Review
- Any Board Decision following a grant of the Request for Review
- All postelection matters, including:

  (a) Objections to election or to conduct thereof

(b) Regional Director's or hearing officer's report and recommendations and proof of service of same

(c) Exceptions to (b), above, and briefs

(d) Supplemental decision, direction, or order, or certification by the Regional Director or the Board.

10286 Submission to Administrative Law Judge

As described in Sec. 10284, a case may be submitted directly to an Administrative Law Judge without a hearing by detailed stipulation of the parties pursuant to Sec. 102.35(a)(9), Rules and Regulations. See sample Joint Motion and Stipulation of Facts in Sec. 10288 which should be modified for submission to an Administrative Law Judge. Three copies of the stipulation should be sent to the Division of Judges and set forth the stipulation of facts, a statement of the issues presented, and each party's statement of position. Such motions may also be filed electronically at the Agency's website under "Division of Judges." See Sec. 11846.4. If the ALJ approves the stipulation, the ALJ will set a time for the filing of briefs. No further briefs shall be filed except by special leave of the ALJ. At the conclusion of the briefing schedule, the ALJ will decide the case or make other disposition of it. Sec. 102.35(a)(9), Rules and Regulations. On issuance of the ALJ's decision, the procedure outlined in Secs. 10430–10444 should be followed.

10288 Submission to the Board

As described above in Sec. 10284, a case may be submitted directly to the Board by joint motion and stipulation of facts, pursuant to Sec. 102.35(a)(9), Rules and Regulations.

The following may be helpful as suggested language for the opening paragraphs of such motion and stipulation:

JOINT MOTION AND STIPULATION OF FACTS

This is a joint motion by the parties to this case, Respondent, Charging Party and General Counsel, to transfer this case to the Board pursuant to Section 102.35(a)(9) of the Board's Rules and Regulations. The transfer of the case will effectuate the purposes of the Act and avoid unnecessary costs and delay.

If this motion is granted, the parties agree to the following:

1. The record in this case consists of the Charge, the [Consolidated**] Complaint, the Stipulation of Facts, the Statement of Issues Presented and each party's Statement of Position.**

2. This case is submitted directly to the Board for issuance of findings of fact, conclusions of law and an Order.

3. The parties waive a hearing, findings of fact, conclusions of law and order by an Administrative Law Judge.

4. The Board should set a time for the filing of briefs [and oral argument**].**

As set forth in Sec. 10284 and Sec. 102.35(a)(9), Rules and Regulations, the stipulation should set forth the agreed upon facts, a statement of the issues presented, and a short statement, not to exceed 3 pages, of each party's position in the case. Where there is a dispute as to the relevancy of certain facts that are stipulated to be true, the following may be added to the stipulation:

> **This stipulation is made without prejudice to any objection that any party may have as to the relevancy of any facts stated herein.**

Eight copies of the stipulation with all exhibits and attachments should be submitted to the Executive Secretary of the Board. Motions may also be filed electronically at the Agency's website under "Board/Office of the Executive Secretary." See Sec. 11846.4.

If the Board approves the stipulation, the Board will set a time for the filing of briefs. Answering briefs may be filed within 14 days, or such further period as the Board may allow, from the last date on which an initial brief may be filed. No further briefs shall be filed except by special leave of the Board. At the conclusion of the briefing schedule, the Board will decide the case or make other disposition of it. Sec. 102.35(a)(9), Rules and Regulations. Subsequent action should accord with procedures described in Secs. 10442–10452.

10290–10294 PRETRIAL MOTIONS AND PREHEARING POSTPONEMENTS

10290 Motions

Pretrial requests (or motions) for postponement or extension of time to file answer, to intervene, or to take deposition should be filed with the Regional Director. Sec. 102.24, Rules and Regulations. All other pretrial motions, except Motions for Summary Judgment or Dismissal, are filed with the appropriate Chief or Associate Chief Administrative Law Judge. Motions for Summary Judgment or Dismissal are filed with the Board.

All pretrial motions filed with the Regional Director or an Administrative Law Judge shall include three copies, with an affidavit of service on the parties. All pretrial motions filed with the Board shall include eight copies with an affidavit of service on the parties. Motions and responses thereto shall be filed promptly and within such time as not to delay the proceeding. Pretrial motions may also be filed in the appropriate office electronically at the Agency's website under "Regional, Subregional & Resident Offices," "Division of Judges," or "Board/Office of the Executive Secretary." See Sec. 11846.4.

10310–10320 INJUNCTIVE RELIEF UNDER SECTIONS 10(j) AND 10(e)

The following sections concern guidelines for considering 10(j) relief and for processing cases in which the 10(j) relief sought involves the substantive issues raised in a charge.

(For discussion of injunctive relief under Section 10(j) and (e) regarding respondent's sale or transference of assets, which may prejudice collection under a Board or court Order, see Compliance Manual, Sec. 10674. For 10(l) priority—CC, CD, CE, and CP—cases, see Secs. 10238–10248.)

10310 Consideration of 10(j) Injunctive Relief

Section 10(j) of the Act authorizes the Board, in its discretion, to petition a district court for temporary relief or a restraining order, pending the Board's adjudication of an unfair labor practice complaint. The Regional Office, based on either the Director's sua sponte determination or a request from the charging party, initially considers whether 10(j) relief is warranted. In contrast to 10(l) injunctive relief, where by statute interim relief must be sought whenever certain unfair labor practices have occurred and are likely to continue, the Board decides on a case-by-case basis whether to authorize the Regional Office to seek 10(j) relief.

10310.1 Notification to Parties

Whenever the issues in a charge reveal that interim relief may be warranted, the Regional Office should notify all parties that it will examine possible 10(j) relief as part

of the investigation of the charge and should invite the parties to submit evidence and argument relevant to the 10(j) consideration. Such notice should be given as soon as feasible in the investigation. Early notice allows the Region to combine the merits and 10(j) aspects of its investigation and thus complete its investigation more expeditiously; it may result in the parties' prompt cooperation in the investigation and also provides them an opportunity to argue to the Regional Office and the General Counsel whether 10(j) injunctive relief is appropriate.

10310.2 Guidelines for the Utilization of Section 10(j)

Section 10(j) is an interim remedy used to preserve or restore the status quo during the time an unfair labor practice case is pending before the Board. Section 10(j) itself authorizes district courts to grant interim relief that is "just and proper." In general, a Regional Office's inquiry into whether 10(j) relief would be appropriate should include consideration of two elements: whether there is a sufficient showing that an unfair labor practice has occurred and whether the effects of that unfair labor practice threaten to make the Board's ultimate remedial order a nullity unless interim relief is obtained. The Regional Office should be guided in its evaluation of potential 10(j) cases by the periodically updated "Section 10(j) Manual," including its discussion of the specific standards of the circuit in which the case arises. This Manual details the types of situations that typically give rise to a need for 10(j) relief, the types of evidence that would support or negate a finding that such unfair labor practices threaten remedial failure and the case law regarding the propriety of 10(j) relief in such situations.

10310.3 Submission to the Injunction Litigation Branch

(a) *10(j) Deemed Appropriate:* When a Regional Director determines that a charge has merit and that 10(j) authorization should be sought, the Regional Office should, within 14 days of the merit determination, submit a memorandum so recommending to the Injunction Litigation Branch, together with a copy of the complaint and any 10(j) position statements submitted by the parties. If the complaint has not issued by the time the Region's 10(j) recommendation is prepared, the Region should not delay submission of its 10(j) recommendation. The complaint should be forwarded to the Injunction Litigation Branch immediately upon issuance. The Regional Office's memorandum should:

- Indicate in the first paragraph whether the recommendation is made sua sponte or based on a charging party request
- Detail the facts and legal theories regarding the violations alleged, including responses to defenses raised by the respondent
- Discuss the impact of the violations on protected activities and the reasons injunctive relief is needed
- Include the proposed order the Regional Office would seek from the district court and

- List counsel representing the parties and include address, phone and fax information

For further information regarding the format of the memorandum, Board agents should consult the Section 10(j) Manual and other directives from the Injunction Litigation Branch. If the General Counsel concludes that 10(j) relief is appropriate, the Regional Office's memorandum, together with any supplemental memorandum of the General Counsel, will be transmitted to the Board for its consideration. The Injunction Litigation Branch will forward to the Regional Office a copy of the General Counsel's memorandum when it is transmitted to the Board.

(b) *When Merit Determination is Submitted to Division of Advice:* If a case which the Regional Office believes warrants 10(j) relief is also being submitted for advice on the merits of the charge, the Regional Office generally should include its 10(j) recommendation together with its request for advice on the merits. In some cases, it may be necessary to wait for the analysis of the Division of Advice, Regional Advice Branch on the merits before preparing a memorandum regarding the propriety of 10(j) relief. The Regional Office may wish to consult with the Regional Advice Branch or the Injunction Litigation Branch to determine the appropriate course of action in a particular case.

(c) *Special Circumstances Requiring Submission:* Regional Offices must submit a written recommendation, as described above in subsection (a), whether for or against 10(j) authorization, in all cases in which it seeks a remedial *Gissel* bargaining order. See GC Memo 99-10.

(d) *10(j) Relief Not Warranted:* Generally, if the Regional Office determines that a case does not warrant 10(j) relief, it need not submit the case to the Injunction Litigation Branch. A Region may always informally consult with the Injunction Litigation Branch regarding the propriety of 10(j) relief in a particular case.

10310.4 Settlement Efforts and Issuance of Complaint and Hearing Date Pending 10(j) Determination

The Regional Office should begin settlement efforts immediately after it has determined that the charge is meritorious and should issue complaint if such settlement efforts fail, even while the 10(j) issue is pending.

(a) *Complaint Hearing Date in 10(j) Cases:* In any case in which a Regional Office finds merit and concludes 10(j) relief is warranted, the Region should proceed to hearing before an ALJ not later than 8 weeks from the issuance of complaint. Regions should generally oppose any requests to postpone the hearing. However, Regional Directors retain discretion to grant, where appropriate, short postponements based on substantial reasons. In the rare occasion when a Regional Office believes there are compelling circumstances which warrant setting a hearing in excess of 8 weeks, clearance should be sought from the appropriate Assistant General Counsel or Deputy AGC in the Division of Operations-Management. In all cases requiring 10(j) relief, Regions should immediately prepare and submit a memorandum to the Injunction

Litigation Branch seeking 10(j) authorization. See OM Memo 06-60 for a detailed discussion regarding ALJ hearings in 10(j) cases.

(b) *Expedited ALJ Hearings:* In cases requiring consideration of the evidence at an ALJ hearing before determining whether to seek 10(j) injunctive relief, a Regional Office should schedule an expedited ALJ hearing not later than 28 days from complaint issuance. Examples of where an expedited hearing may be appropriate include consideration of a substantial defense to alleged discriminatory action under *Wright Line*, an economic defense to a restoration remedy, or where there are serious issues regarding witness credibility. Immediately upon the closing of the hearing, or earlier where appropriate, a Regional Office should evaluate whether to seek 10(j) relief. An exception to such an immediate evaluation may arise in cases where the strength of a defense depends solely on critical determinations to be made by the ALJ. See OM Memo 06-60 for a detailed discussion regarding ALJ hearings in 10(j) cases.

10310.5 Preparation of Court Papers and Expeditious Filing

Upon notice that the Regional Office's recommendation has been submitted to the Board, the Regional Office should finalize its 10(j) petition and supporting memorandum of law. If the Board authorizes 10(j) proceedings, the Injunction Litigation Branch will notify the Region. Absent settlement, the Regional Office should file the 10(j) petition with the district court within 48 hours of notification from the Injunction Litigation Branch. If the Regional Director believes a delay in filing would be productive, (e.g., a settlement is imminent and the filing of the petition may upset the prospective settlement), the Regional Office should seek telephone authorization from the Injunction Litigation Branch to file the petition outside the 48-hour deadline.

10310.6 Court Action; Expeditious Processing

The Regional Office should request from the district court expedited consideration of its 10(j) petition. If the district court issues an order to show cause returnable at an unduly late date and the circumstances demonstrate a need for more immediate relief, the Regional Office may wish to consider seeking a temporary restraining order. In such situations or in other circumstances indicating that the district court will not expeditiously hear and decide the 10(j) petition, the Regional Office should follow the procedures set out in the Section 10(j) Manual and consult with the Injunction Litigation Branch.

In all cases where 10(j) injunctive relief is sought or obtained, General Counsel policy requires that the underlying unfair labor practice case be expedited. See also Sec. 102.94(a), Rules and Regulations. To that end, the Regional Office should:

- Schedule the hearing for a date as early as possible (Sec. 10310.4)
- Notify the Administrative Law Judge that 10(j) relief has been sought or obtained and, on the record, request that the matter be expedited
- Oppose any unwarranted attempt by any party to delay the proceeding

- In any brief filed with the Board, note that 10(j) relief has been sought or obtained and request that the matter be expedited

- When the case is transferred to the Board, notify the Executive Secretary of the status of the 10(j)

10310.7 Post 10(j) Informal Settlements

When a 10(j) injunction has been obtained prior to the settlement of a case, the standard provision for withdrawal of the complaint on execution of the settlement should be altered through an addendum to the settlement agreement form to provide for withdrawal of complaint upon closing of the matter in compliance. Sec. 10146.4.

10312 Appeals and Contempt of 10(j) District Court Orders

The Injunction Litigation Branch handles all appeals from district court orders in 10(j) cases. Accordingly, whenever the requested relief is denied in whole or in part, the Regional Office should immediately notify the Injunction Litigation Branch. As soon as possible, the Regional Office should forward to the Injunction Litigation Branch copies of the court's decision or order, the Regional Office's petition, supporting memoranda and exhibits and the respondent's Answer or Opposition and supporting papers, together with the Regional Office's written recommendation on whether an appeal should be taken.

If respondent notifies the Regional Office that it intends to appeal from the grant of an injunction or serves the Regional Office with a notice of appeal, the Regional Office should immediately notify the Injunction Litigation Branch and forward a copy of the notice of appeal.

Whenever it is claimed that an injunction is being violated, the Regional Office should notify respondent of the claim and conduct an investigation. If upon conclusion of the investigation, the Regional Office determines that respondent, by clear and convincing evidence, has engaged in contumacious conduct, the Regional Office should submit to the Injunction Litigation Branch a recommendation on whether to institute contempt proceedings.

10314 Effect of Board's Decision and Order on 10(j) Proceeding

In cases where the Regional Office has obtained a 10(j) Injunction or has such a request pending in a district court, if the Board issues a Decision and Order in the corresponding unfair labor practice proceeding, such Board Decision and Order renders moot the injunctive relief sought. See *Sears, Roebuck & Co. v. Carpet Layers Local 419*, 397 U.S. 655 (1970); *Johansen v. Queen Mary Restaurant Corp.*, 522 F.2d 6 (9th Cir. 1975). Since the Board's Decision and Order supplants the necessity for injunctive relief under 10(j) of the Act, the Regional Office, after consultation with the Injunction Litigation Branch, should inform the district court, in writing, of the issuance of the Board decision and its impact on the 10(j) decree.

10320 Injunctive Relief Under Section 10(e)

Section 10(e) of the Act provides that while a petition for enforcement is pending, the court "shall have power to grant such temporary relief or restraining order as it deems just and proper." See *Auto Workers v. NLRB*, 449 F.2d 1046, 1050 (D.C. Cir. 1971). When a 10(j) injunction expires as the result of the issuance of a Board Order, absent immediate compliance with such order, the Regional Office should promptly recommend to the Division of Enforcement Litigation that enforcement proceedings commence and that Enforcement seek a new injunction under Section 10(e), unless changed circumstances render such action unnecessary or appropriate. In addition, the Regional Office should consider the appropriateness of seeking 10(e) injunctive relief with respect to any case pending or to be filed in a circuit court, even if 10(j) was not earlier sought or had been denied.

If such relief is necessary to effectuate the purposes and policies of the Act, the Regional Director's memorandum to Enforcement should discuss the Board's Decision and Order and set forth the reasons that interim injunctive relief is just and proper. Based on the Regional Office memorandum and the evidence submitted in support, Enforcement will determine if such injunctive relief under 10(e) should be sought.

10330–10352 TRIAL PREPARATION

10330 General Preparation

Appropriate preparation is critical to successful prosecution of a case. Accordingly, the period immediately preceding the hearing should be devoted to analyzing the pleadings, reviewing the evidence uncovered during the predecisional investigation, conducting further investigation of evidence relevant to the complaint, preparing the witnesses, and discussing trial strategy with supervision.

10331 Guidance for High Quality Litigation

In order to consistently maintain the highest quality and success in litigation of cases, Regional Offices and Board agents should routinely consult this manual, the Rules and Regulations, Board and court decisions, the Pleadings Manual, the Division of Judges Bench Book, and OM and GC memoranda. In particular, the Agency's quality committee periodically reviews field office performance in the various facets of litigation throughout the country and issues memoranda recommending practices for ensuring the highest quality litigation, starting with accurate and precise complaint drafting and continuing through trial preparation, presentation and briefing. See OM Memos 06-16, 06-91, and subsequent memoranda. Regional Offices and Board agents should be guided by these recommendations in conjunction with their own experience and should follow the practices set forth in the memoranda.

10332 Analysis of Pleadings

The trial attorney must carefully analyze the complaint(s) and answer(s) to determine what is admitted and what must be proved at hearing. Additionally, such review will enable the trial attorney to organize pretrial preparation and plan the introduction of evidence and arguments to be made at hearing.

10334 Pretrial Preparation and Investigation

The trial attorney has an initial obligation to become familiar with the contents of all evidence in the investigative file. Moreover, the trial attorney should also seek any additional evidence bearing upon the allegations of the complaint. When such evidence arguably supports further complaint allegations, the trial attorney should bring such evidence to the Regional Office's attention. Likewise, when such evidence arguably undermines any complaint allegations, the trial attorney should bring such evidence to the Regional Office's attention.

In particular, in order to maintain the highest possible quality in litigation (see Sec. 10331 and OM Memos 06-16 and 06-91), the trial attorney in consultation with the Regional Office should focus on:

- Continuous review of a case for changes in the facts and the law
- Emerging legal issues or high profile cases likely to receive press attention which may require consultation with the Division of Advice
- Obtaining and presenting corroborative testimony or evidence

10334.1 Examination of Documents

The trial attorney should review all documents which could be introduced at trial and give consideration to the most effective manner in which the documents can assist in examining witnesses.

10334.2 Interview of Witnesses

The trial attorney should interview each prospective witness intensively and as frequently as is necessary in order to properly prepare for trial. Such interview should avoid leading questions, should address all matters that might likely be covered by cross-examination and should thoroughly prepare the witness for credibility challenges. See OM Memo 06-16. For general principles regarding interviews of witnesses, see Secs. 10054.2 and .3; regarding credibility, see Sec. 10064.

When a witness suffers a loss of memory on an important matter, that phase of the testimony should be reviewed until the Regional Office is satisfied with the reliability of the witness' memory. Any details that will help to refresh such memory should be noted. If difficulty is experienced in directing the witness' attention to a new subject, the attorney should set forth in the trial brief the actual question, in a form that will succeed in so directing the witness' attention.

The necessity for re-interviews will be determined by the nature of the case and the ability of the witness. Repeated interviewing creates a possibility of reducing the witness' testimony to an apparently rehearsed story; such risk must be weighed against the advantages of fixing details and of obtaining additional information. Late filed pleadings are one circumstance which may militate in favor of re-interviews.

Preparing non-English speaking witnesses often requires additional time. The trial attorney should also be sensitive to any special problems that need to be addressed during the interview.

The trial attorney should advise the Regional Office whenever significant evidence is adduced or where critical matters that affect credibility of a witness are discovered.

10334.3 Affidavits from Additional Witnesses

Whether the trial attorney should take an affidavit from a prospective witness who did not give a prior affidavit will depend upon an assessment of various circumstances, including:

- Whether the witness' testimony relates to a new issue not currently in the complaint or merely corroborates an existing allegation
- The relative significance of the testimony in relationship to the overall case
- An evaluation of the likely reliability and cooperation of the witness at trial

10334.4 Instructions to Witnesses

The trial attorney should instruct all witnesses that the truth is expected at all times, regardless of who may be helped or harmed. Specifically, the trial attorney should inform the witness that the obligation to answer truthfully extends to all matters, including any conversations with the trial attorney. The goal of pretrial witness interviews is to prepare the witness to testify truthfully and completely.

In addition, the trial attorney should instruct witnesses that, at the hearing, the witness should consider each question before answering it; should ask for a rephrasing if the question is not understood; should remain calm in the face of possible argumentative or hostile cross-examination and should answer no question to which an attorney objects unless and until the Administrative Law Judge overrules the objection. Finally, the trial attorney should routinely review with each witness the standard witness instructions during pretrial preparation. See OM Memo 06-91.

10334.5 Charged Party's Ability to Comply with Remedy

At all postcomplaint stages, the trial attorney should assess respondent's current and, when possible, future ability to comply with the remedy sought by the Agency. The

trial attorney should be alert to evidence from the charging party, the witnesses and respondent as appropriate. Any indication that respondent has rendered or will render itself unable to comply should be fully investigated and appropriate action taken. Consideration should again be given to the appropriateness of 10(j) protective relief (Compliance Manual, Sec. 10594.2) or amendment of the complaint to allege parties, such as an alter ego, successor, individual, trustee in bankruptcy, or other party, as derivatively liable for remedying the alleged unfair labor practices. Secs. 10054.2(c), 10264.3, 10274 and Compliance Manual, Secs. 10505.4 and 10596. The trial attorney should continue to monitor respondent's ability to comply until the case is transferred to the Compliance Officer. Sec. 10407.5.

In addition, the charging party and witnesses whose potential remedial rights may be affected should be advised to notify the trial attorney immediately of any significant change in respondent's operation, identity or financial condition, so that an assessment of ability to comply or derivative liability can be made.

10335 Interpreters for Hearing

When interpreters are required for hearing, the Regional Office should consult OM Memo 06-49 and the attached guidelines for the best practices to follow in order to:

- Seek the services of qualified interpreters
- Educate interpreters about our procedures
- Advise interpreters of their responsibilities in a formal hearing, particularly the need to avoid even the appearance of partiality and to ensure proper translation.

10340 Service of Trial Subpoenas

Subpoenas should, where circumstances allow, normally be served at least 2 weeks prior to trial. This allows sufficient time to arrange for production of the witness or documents and for ruling on a petition to revoke prior to trial. Secs. 11778 and 11782.4. Any subpoena should be served on the party, with a copy sent to the attorney or other representative of the party or witness by mail or facsimile, depending upon the circumstances.

10380–10409 THE HEARING

10380 Role and Conduct of Trial Attorney

The trial attorney is an advocate who prosecutes the case as set forth in the complaint on behalf of the General Counsel. The trial attorney represents the public's interests by presenting evidence and arguments in support of the complaint with honesty and integrity. In order to maximize the potential for success, the trial attorney should be guided by the recommendations and suggested practices set forth in the memoranda of the quality committee in conjunction with the Regional Office's and trial attorney's own experience. See OM Memos 06-16 and OM 06-91.

10404 Appeals to Board

Sec. 102.26, Rules and Regulations requires special permission of the Board before a party may file a direct appeal to rulings and orders of the Administrative Law Judge. Requests for such permission should be made promptly in writing, with a copy served on each other party and on the ALJ. Requests for Special Permission to Appeal rulings and orders of the ALJ may also be filed electronically at the Agency's website under "Board/Office of the Executive Secretary." See Sec. 11846.4. The request for special permission to appeal should succinctly state the ruling, the surrounding circumstances and the grounds urged for reversal.

Counsel for the General Counsel should consult with the Regional Office before filing a request with the Board for special permission to appeal. Factors to be weighed before deciding to specially appeal include the importance of the issue to the overall prosecution of the case and the likelihood that the Board will grant such special permission.

Ordinarily, the hearing should not be delayed because a party seeks special permission to appeal a ruling or order. Counsel for the General Counsel should exercise discretion in deciding whether to submit to the Board an opposition to the request.

10407 Remedy Sought

10407.1 Statement on Record

The complaint should set forth any specific remedies that are in addition to those traditionally granted for the violations alleged. See Secs. 10131, 10266.1, and 10410. Counsel for the General Counsel, with the Administrative Law Judge's permission, may reiterate and expand upon the reasons for such remedies at hearing, in addition to arguing for such remedies in the brief.

10410–10444 POSTHEARING

10410 Briefs to Administrative Law Judge

Briefs should normally be filed in the absence of oral argument and especially where involved credibility issues are present, the record is long, the issues varied or where legal argument may be helpful. The following briefing guidelines may be useful.

The brief should be succinct and address:

- All alleged violations and the testimony and exhibits in support with specific record citations
- All points specifically raised by the Administrative Law Judge or that otherwise appear to be of concern to the judge
- Issues of credibility, highlighting undisputed facts and evidence and inconsistencies in testimony, inherent probabilities of witness' testimony, whether the testimony was specific and detailed and whether it was adduced by leading questions
- Argument and case law for the substantive allegations and for any specifically pled remedies the General Counsel is seeking

Additionally, the brief should be scrupulously accurate and comprehensive in discussing the case-in-chief and dealing with adverse evidence.

Three copies of the brief shall be filed with the ALJ and a copy served on all other parties, with a statement of service furnished on all copies. Time limits set by the ALJ and any subsequent rulings by the Division of Judges must be met. Sec. 102.42, Rules and Regulations. Briefs also may be filed electronically at the Agency's website under "Division of Judges." See Sec. 11846.4.

Copies of the brief should be retained in electronic form for use in possible exceptions or for briefs in support of the ALJ's decision. Sec. 10438.

The trial attorney, supervisor, and Regional Attorney should carefully review Respondent's brief to uncover and address potential problems. If the entire case or a particular allegation appears to have a fatal flaw, reconsideration may be warranted.

Regions should also be alert to changes in the law and take appropriate action. Additionally, in *Reliant Energy*, 339 NLRB 66 (2003), the Board adopted a procedure, modeled after Rule 28(j) of the Federal Rules of Appellate Procedure, which permits parties in unfair labor practice cases and in representation cases to call to the Board's attention pertinent and significant authorities that come to a party's attention after the party's brief has been filed.

10438 Exceptions, Cross-Exceptions, Briefs Supporting the Administrative Law Judge's Decision and Requests for Oral Argument

Sec. 102.46, Rules and Regulations sets forth the time limits and format of exceptions, cross-exceptions and briefs in support, as well as any answering briefs and reply briefs. The time limits, format and strictures of Sec. 102.46 must be read with care and followed. The various filings described below may also be filed electronically at the Agency's website under "Board/Office of the Executive Secretary." See Sec. 11846.4.

10438.1 Filing of Exceptions and Cross-Exceptions

Any party, including the General Counsel, may file written exceptions and a brief in support of those exceptions contending that a material part(s) of the Administrative Law Judge's decision and recommended order is erroneous and should not be adopted by the Board. Cross-exceptions may be filed in response to another party's exceptions by any party who has not previously filed exceptions; they are governed by the same rules and format applicable to exceptions. Sec. 102.46(e), Rules and Regulations. Eight copies of the exceptions or cross-exceptions and any brief in support must be filed with the Board, with copies served on all other parties. See also Sec. 11846.4 for electronic filing and service.

10438.2 Time for Filing Exceptions and Cross-Exceptions

Exceptions must be filed within 28 days of service of the order transferring the case to the Board, unless an extension of time is granted. Sec. 102.46(a), Rules and Regulations.

Cross-exceptions must be filed within 14 days from the last date on which exceptions and any supporting brief may be filed, unless an extension of time is granted. Sec. 102.46(e), Rules and Regulations.

Secs. 102.111–102.114, Rules and Regulations govern time computations and other service and filing requirements and must be strictly followed. Exceptions, cross-exceptions, briefs in support, and other briefs in this topic area are accepted as timely filed by the Board if they are "postmarked on the day before (or earlier than) the due date" or hand delivered to or electronically received by the Board on or before the closing time of the receiving office on the due date. See particularly Sec. 102.111(b).

10438.3 Responsibility for Determination and Preparation of Exceptions and Cross-Exceptions

Ordinarily, the Regional Office determines whether to file exceptions or cross-exceptions. However, where a complaint was authorized by the Office of the General Counsel, normally the Division of Advice or the Office of Appeals, the Regional Office should make a timely recommendation to the branch or division involved as to filing exceptions or cross-exceptions and whether the original theory or another should be pursued.

Generally, exceptions should be filed when there is a reasonable possibility of success and the matter involved is of sufficient importance to the overall case. The standard for cross-exceptions should be substantially similar. Credibility findings are

often difficult to successfully overturn and should normally be attacked only when other factors besides "demeanor" are the basis of the resolution.

Exceptions to *favorable* Administrative Law Judge findings and conclusions should be filed only where there are obvious errors, the rationale of the ALJ needs bolstering or the recommended remedy is inappropriate or inadequate.

10438.4 Preparation of Exceptions and Cross-Exceptions

Sec. 102.46(b), Rules and Regulations sets forth the format and requirements of each exception filed and Sec. 102.46(c) addresses the format and substance of the brief in support. The format and requirements for cross-exceptions and any brief in support thereof are governed by the same considerations applicable to exceptions. Sec. 102.46(e), Rules and Regulations. These documents frame the issues presented to the Board for its consideration. The supporting brief, if filed, contains the argument and citation of authority and the exceptions shall not contain such argument and citations, unless no supporting brief is filed. Together, both documents should, at a minimum, make clear:

- Specifically, the questions of procedure, fact, law or policy to which exception is taken
- Where in the Administrative Law Judge's decision each excepted to item is found or discussed
- What transcript pages and/or exhibits support the argument being made
- Where a disputed ruling may be found in the Administrative Law Judge's decision or the transcript
- The reasons and citations of authority the party asserts to support its position

Broad general exceptions, which do not clearly identify the issues, are not acceptable. See *Howe K. Sipes Co.,* 319 NLRB 30 (1995). For example, an exception claiming the ALJ failed to find a violation of Section 8(a)(1) or 8(b)(1)(A), without more, is insufficient. On the other hand, such an exception is sufficient if it identifies a specific complaint allegation the ALJ found without merit, or did not address, and, in tandem with the brief in support, contains the specificity described above. If no brief is filed, the supporting argument must be included in the exceptions.

10438.5 Answering Briefs and Reply Briefs

Sec. 102.46(d) and (f), Rules and Regulations provide for the content, circumstances and time to file answering briefs to exceptions. Reply briefs to answering briefs are addressed in Sec. 102.46(h).

10438.6 Requests for Oral Argument – Division of Advice Notification

A request for oral argument before the Board should be filed, if at all, along with the exceptions. The Regional Office should not request argument without clearance from the Division of Advice.

10438.7 Briefs in Support of Administrative Law Judge's Decision

Any party may file a brief in support of the Administrative Law Judge's decision. Sec. 102.46(a), Rules and Regulations. The number of copies and service are the same as exceptions.

10442 Oral Argument Before Board

The Regional Office should notify the Division of Advice if oral argument is ordered by the Board and consult regarding who will argue, the nature of the argument and related details.

10444 Posthearing Motions

Motions filed by any party after the close of the hearing but before transfer to the Board should be filed with the Administrative Law Judge. Sec. 102.24(a), Rules and Regulations.

After transfer to the Board, motions should be filed with the Board by transmitting eight copies and an affidavit showing service on all other parties. Sec. 102.47, Rules and Regulations. See also Secs. 10412 and 10452. Posthearing motions may also be filed in the appropriate office electronically at the Agency's website under "Division of Judges" or "Board/Office of the Executive Secretary." See Sec. 11846.4.